1989

First Interstate Bank of Utah, N.A., a Utah corporation v. Frederick G. Becker, II, Margaret M. Becker, J. Lynn Dougan, Diana Lady Dougan, Park Meadows Inbestment Co., aka Park Meadows Development Co., a Utah partnership : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DOCKET NO.

FIRST INTERSTATE BANK OF UTAH, N.A., a Utah Corporation, Plaintiff and Appellant, vs. FREDERICK G. BECKER, II, MARGARET M. BECKER, J. LYNN DOUGAN, DIANA LADY DOUGAN, PARK MEADOWS INVESTMENT CO., a/k/a PARK MEADOWS DEVELOPMENT CO., a Utah partnership, Defendants and Respondents.	)	Consolidated Cases No. 89-0497, -0597, -0607

ON APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT FOR SUMMIT COUNTY, STATE OF UTAH

BRIEF OF APPELLANT FIRST INTERSTATE BANK

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No. 89-0497: The district court entered summary judgment in favor of defendants and appellees Frederick G. Becker II, Margaret M. Becker (the "Beckers"), J. Lynn Dougan and Diana Lady Dougan (the "Dougans") on May 5, 1989. R. 1414-1416.[1] The judgment was certified as final pursuant to Rule 54(b), Utah Rules of Civil Procedure. Plaintiff and appellant First Interstate Bank of Utah, N.A. ("First Interstate") filed a notice of appeal to the Utah Supreme Court on May 16, 1989. R. 1426-1428. Jurisdiction was invoked pursuant to Utah Code Ann. § 78-2-2(3)(i). The Utah Supreme Court assigned the appeal to the Utah Court of Appeals.

No. 89-0607: The district court entered summary judgment in favor of defendant and appellee Park Meadows Investment Co. ("Park Meadows") on July 6, 1989. R. 1537-1538. A timely notice of appeal to the Utah Supreme Court was filed on Monday, August 7, 1989. R. 1539-1543. Jurisdiction was invoked pursuant to Utah Code Ann. § 78-2-2(3)(i). The Utah Supreme Court assigned the appeal to the Utah Court of Appeals.

No. 98-0597: The district court awarded the Beckers and Dougans their claimed costs on July 6, 1989. R.

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1 "R." refers to the record on appeal prepared in accordance with Rule 11(d)(2)(B), Rules of the Utah Court of Appeals.

1517-1519. Following a timely appeal to the Utah Supreme Court, the appeal was remanded to this Court. This Court subsequently consolidated all appeals in this matter.

QUESTIONS PRESENTED

1. Whether First Interstate properly accelerated payment of a note executed by Park Meadows' predecessor in interest and guaranteed by the Beckers and Dougans?

2. Whether the Beckers and Dougans, as guarantors of the note, were entitled to notice of the principal obligor's default?

3. Whether, even assuming some default in First Interstate's notice obligations, the Beckers and Dougans are properly entitled to an absolute discharge without a showing of prejudice?

4. Whether First Interstate is entitled to partial summary judgment establishing the Beckers' and Dougans' liability under the note?

5. Whether Rule 54(d)(2), Utah Rules of Civil Procedure, permits the recovery of deposition costs unrelated to the merits of a motion for summary judgment?

STATUTE AND RULE INVOLVED

Utah Code Ann. § 57-1-31 (1986) and Rule 54(d)(2), Utah Rules of Civil Procedure, are reproduced as Addendum A to this brief. Rule 24(f), Rules of the Utah Court of Appeals.

STATEMENT OF THE CASE

A. Nature of the case and proceedings below

First Interstate commenced this action in December 1986 by filing a complaint in the District Court of the Third Judicial District, Summit County, against Park Meadows, the Beckers, the Dougans, Victor R. Ayers and Marion P. Ayers (the

"Ayers").[2] The complaint, filed by leave of the bankruptcy court in the midst of a protracted Chapter 11 proceeding involving Park Meadows,[3] sought judicial foreclosure of a deed of trust executed by Park Meadow's predecessor in interest, as well as collection of the underlying note. That note had been guaranteed by the Beckers, the Dougans and the Ayers. R. 1-28.

On September 26, 1988, First Interstate filed a motion for partial summary judgment seeking to establish the liability of the Beckers, Dougans and Ayers as guarantors of the note. R. 723-798. That motion was denied by the district court on December 8, 1988. R. 1098-1100. On February 3, 1989, the Beckers and Dougans filed a motion for summary judgment seeking discharge of their obligations as guarantors on the ground that First Interstate had improperly accelerated the note. R. 1121-1202. That motion, which was granted, provides the basis for this appeal.

B. Factual background

In December 1978, Park City Racquet Club, Inc. ("PCRC") obtained an $800,000 loan from Walker Bank, a

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2 The complaint also named First Security Bank of Utah, N.A. as a defendant. First Security was joined in the suit because it held a junior secured interest in the racquet club property. No claim, however, was asserted against First Security.

3 First Interstate was granted relief from the automatic stay on November 15, 1986. 11 U.S.C. § 362(d).

predecessor of First Interstate. The loan was evidenced by a note executed by Frederick G. Becker, II, president of PCRC, and Victor R. Ayers, secretary of the corporation. R. 1261-1264 (a copy of the note is attached as Addendum B to this brief). The note was secured by a deed of trust covering PCRC's principal asset, a racquet club located in Park City, Utah. In addition, the note was personally guaranteed by Becker and his wife, Ayers and his wife, and the Dougans (the "guarantors"). The guaranty, appended to the end of the note, provides in its entirety (R. 1263; Addendum B):

> For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the undersigned jointly and severally guarantee payment of this Promissory Note (Secured by Deed of Trust) and further guarantee payment of the entire indebtedness evidenced thereby and the Deed of Trust securing the same.

On May 19, 1982, PCRC transferred undivided one-third interests in the racquet club to Becker, Dougan and Ayers. This transfer was explicitly made "[s]ubject to a loan in favor of Walker Bank & Trust Company . . . the unpaid balance of which the Grantee [i.e., Becker, Dougan and Ayers] hereby agrees to assume and pay." R. 1266-1267. In August 1982, Becker and Dougan exchanged their interests in the racquet club for certain lots in a Park City development owned by Park Meadows, a partnership consisting of Enoch Smith, Enoch Richard Smith and Ayers. R. 1269, 1271. As part of this exchange, Park Meadows and its partners agreed to fully

indemnify Becker and Dougan from any liability (including attorneys' fees) arising from their guaranty of the note. R. 1182.

The Beckers and Dougans asserted that, at the time of the exchange, Park Meadows assumed the payment obligations evidenced by the note. E.g., R. 1319. Indeed, by letter dated September 2, 1982, to First Interstate, Dougan told First Interstate that Park Meadows had assumed full responsibility for the loan. R. 1271. Dougan also testified that he instructed First Interstate to send all further notices to Park Meadows (R. 1274):

> Q. After the exchange, did you continue to receive payment notices on the racquet club for a period of time?
>
> A. No, not to my recollection. I think - - We very clearly noticed the bank not only were we exchanging our interests but that the Smiths and Park Meadows -- Smiths and Ayers and Park Meadows Development were assuming and paying the loan and they would do so after a date certain. And my recollection is that we didn't receive any further notices.
>
> Q. You directed the bank to sent the notices someplace else?
>
> A. I would - - yes.
>
> . . .
>
> Q. That was a "yes"?
>
> A. Yes. That was a "yes".

The Beckers and Dougans, however, have never produced, nor has First Interstate received, a copy of an assumption agreement executed by Park Meadows.

Following its acquisition of the racquet club, Park Meadows encountered substantial difficulties meeting its obligations under the note. Pursuant to Mr. Dougan's directions (R. 1271, 1274), First Interstate sent notices of nonpayment to Park Meadows. In addition, in June 1985, First Interstate and Park Meadows entered into a work-out agreement to restructure other outstanding loans made to Park Meadows by First interstate and First Security. R. 1057-1059 A copy of the work-out agreement is attached as Addendum C to this brief. Park Meadows, however, failed to comply with the terms of the work-out agreement. First Interstate also did not receive any payments due under the note after November 1, 1985. R. 756.

On January 24, 1986, First Interstate notified Enoch Richard Smith, a partner of Park Meadows, that the note was in default and that, unless all past due amounts under the note were paid by February 7, 1986, First Interstate would "take the legal actions available to them under the terms of the loan documents." R. 1193. Among the actions available to First Interstate was the right, "without notice or demand," to declare "the entire remaining unpaid balance of both principal and interest . . . immediately due and payable" if Park

Meadow's default was not cured "within fifteen (15) days following . . . written notice" of default. Addendum B. The note expressly provided that "written notice shall be effective as of the time the same is deposited in the United Sataes [sic] Mails addressed to the last known address of the undersigned or the time of the actual receipt thereof, if earlier." Id. The note further provided that (id.):

> The makers, . . . guarantors, and endorsers hereof severally waive . . . notice of nonpayment, and expressly agree that this Note, or any payment hereunder, may be extended from time to time by the holder hereof without in any way affecting the liability of such parties.

On February 10, 1986 -- seventeen days after notifying Park Meadows of its default -- First Interstate executed a statutory notice of default accelerating the sums payable under the note. The notice of default was recorded on February 14, 1986. R. 1195. On February 21, 1986, copies of the notice of default were sent by certified mail to, among others, PCRC, Frederick G. Becker, II, Margaret M. Becker, J. Lynn Dougan, and Diana Lady Dougan. R. 1277-1283. J. Lynn Dougan later acknowledged that PCRC received a copy of the notice of default at its corporate address shortly after February 21, 1986. R. 1198. Following receipt of the notice of default, the Beckers and Dougans had a statutory three-month period in which they could cure the default in the note

by paying all then past-due sums. Utah Code Ann. § 57-1-31(1). That right to cure was not exercised.

The property was not sold pursuant to the statutory notice of default. On March 24, 1986, an involuntary bankruptcy proceeding was initiated against Park Meadows. The filing of that action automatically stayed the pending sale of the property under the deed of trust. 11 U.S.C. § 362. This action, seeking judicial foreclosure, was instituted in December 1986 after First Interstate obtained relief from that automatic stay.

On January 26, 1987, the district court appointed a receiver to manage the racquet club. R. 47-49. Then, on October 16, 1987, and pursuant to stipulation of the parties, the district court entered an order permitting the sale of the racquet club. The sales price of the club was $425,000. R. 757. All proceeds from the sale of the club were applied to the note. Id. As of September 26, 1988, there remained due and owing under the terms of the note the principal sum of $719,517.54, together with approximately $100,000 in accrued interest. Id. As a result, the liability of the Beckers, Dougans and Ayers as guarantors of the note became the focus of this litigation.

C. Arguments and decision below

On September 26, 1988, First Interstate moved for summary judgment on the issue of the liability of the Beckers

and Dougans under the note. R. 730-798. In their answer to the complaint, the Beckers and Dougans asserted that First Interstate had released one of the partners of Park Meadows and had otherwise impaired the collateral securing the note. R. 114. These actions, they contended, resulted in the discharge of their guaranty obligations. Id. First Interstate submitted that these defenses were factually unsupported because undisputed record evidence demonstrated that the bank had not released any of the principals of Park Meadows and had applied the entire proceeds of the sale of the racquet club to the note. R. 740-746, 749-750. In addition, First Interstate argued that the defenses were legally inadequate because the Beckers and Dougans were fully indemnified sureties. R. 746-749. This motion was denied on May 5, 1989. R. 1414-1416.

The Beckers and Dougans thereafter filed their own motion for summary judgment. The motion was founded upon an exceedingly narrow ground: that First Interstate had not properly accelerated the debt evidenced by the note. 1124-1173. The acceleration was defective, the Beckers and Dougans asserted, because First Interstate had not given 15 days written notice of its intent to accelerate (R. 1149-1153), and had failed to give written notice to PCRC -- the original maker of the note. R. 1135-1149. In addition, the Beckers and Dougans contended that, even though the

language of their guaranty contains no express notice requirement, they were entitled to notice because the note and the guaranty should be "read together." R. 1153-1171.

In response, First Interstate argued that its January 24, 1986 letter to Park Meadows strictly complied with the 15-day notice provisions contained in the note. R. 1242-1245. Moreover, notification of Park Meadows rather than PCRC was appropriate for several reasons: first, the bank had been directed to send all further notices to Park Meadows (R. 1271-1274); second, notification of PCRC was impossible because the corporation had been dissolved on December 21, 1982 (R. 1392-1407); and third, by virtue of the assumption of the note, Park Meadows as assignee was entitled to first receive the notice of default. The Beckers and Dougans, furthermore, were not entitled to notice as guarantors because their guaranty did not contain an express notice provision. R. 1245-1255. Finally, even if the Beckers and Dougans were entitled to notice, defective notice did not properly result in their absolute discharge but rather released them only to the extent they established prejudice -- which they could not because of their failure to cure Park Meadows' default during the three-month statutory cure period. R. 1235, 1241; Utah Code Ann. § 57-1-31(1).

The district court granted the Beckers' and Dougans' motion for summary judgment by order entered May 5, 1989.

That order found that "[t]he giving of a proper 15 day notice was a condition precedent to the right of plaintiff to exercise its option to accelerate" the note. R. 1415. The court then found, without specifying a precise shortcoming, that "[t]he notice required to be given by plaintiff to defendant Park Meadows Development prior to plaintiff exercising its option to accelerate was defective." Id. Finally, the court found that "[t]he 15 day notice required by the loan documents to be given prior to accelerating the Racquet Club note was not given by plaintiff to the original maker, Park City Racquet Club, to defendants Dougans, Beckers and Ayers, who assumed the Racquet Club note and thereby became makers, nor to defendants Dougans, Beckers and Ayers in their capacity as guarantors." Id. Without further discussion, the court entered a judgment of "no cause of action" in favor of the Beckers and the Dougans. R. 1416.

On May 19, 1989, Park Meadows filed a motion for summary judgment based on the district court's finding that First Interstate's notice to Park Meadows "was defective." R. 1451. The court granted the motion for summary judgment on July 6, 1989. R. 1537-1538.

While Park Meadows' motion for summary judgment was pending, the Beckers and Dougans filed a Memorandum of Costs and Disbursements, seeking to recover nearly $2,800 in deposition costs. R. 1421-1423. First Interstate objected to

the recovery of those costs because the depositions were not necessary to the prosecution of the summary judgment motion. R. 1453-1460. The district court rejected First Interstate's submission, and permitted recovery of all claimed deposition costs.

Unlike the Beckers, Dougans and Park Meadows, the Ayers have not moved for summary judgment. Accordingly, the claims against the Ayers are still pending before the district court.

SUMMARY OF ARGUMENT

The district court's judgment rests upon a series of interlocking -- but fundamentally flawed -- propositions propounded by the Beckers and Dougans. First, they argued that First Interstate erroneously gave 14 -- rather than 15 -- days notice of its intent to accelerate the note. Next, they asserted that the notice was insufficient because it was given to the primary obligor under the note -- Park Meadows -- rather than the original maker, PCRC. Finally, they submitted that their guaranty obligations have been discharged because they did not receive 15 days notice of First Interstate's intent to accelerate. These arguments are unavailing.

First Interstate's written notice of its intent to accelerate strictly complied with the notice provisions of the note. Pursuant to well-established law, that notice was properly given to the primary obligor under the note. And,

because the Beckers' and Dougans' guaranty did not contain an express notice provision, they were not entitled to notice prior to acceleration. Moreover, even if the Beckers and Dougans could establish a right to notice as guarantors, any failure to receive notice does not result in their absolute discharge, but rather releases them only to the extent they demonstrate prejudice -- a showing conclusively precluded by this record. Utah Code Ann. § 57-1-31(1). Indeed, far from excusing their voluntarily incurred contractual obligations, the record below unequivocally establishes the Beckers' and Dougans' liability under the note. The district court, therefore, should be reversed and this case remanded with directions to enter partial summary judgment in favor of First Interstate.

In addition to the foregoing, the district court improperly permitted the Beckers and Dougans to recover costs incurred in taking depositions completely unrelated to the merits of their motion for summary judgment. Rule 54(d)(2), Utah Rules of Civil Procedure, precludes this result.

ARGUMENT

I. FIRST INTERSTATE'S WRITTEN NOTICE OF INTENT TO ACCELERATE WAS NOT DEFECTIVE

The Beckers and Dougans argued, and the district court found, that "[t]he notice required to be given by

plaintiff to defendant Park Meadows Development prior to plaintiff exercising its option to accelerate was defective." R. 1415. The sole defect isolated by the Beckers and Dougans was that the January 24, 1986 letter to Park Meadows gave "14 days written notice" while First Interstate "had to give 15 days notice before exercising its option to accelerate." R. 1149. This assertion, however, is both hypertechnical and controverted by the express terms of the note.

To begin with, the note does not require -- as the Beckers and Dougans asserted below (R. 1149) -- that First Interstate explicitly warn a defaulting party when the 15-day cure period will expire. Rather, the note provides that notice of default must be given, Then, following such notice, First Interstate has the option to declare "the entire remaining unpaid balance of both principal and interest . . . immediately due and payable" if the default is not cured "within fifteen (15) days following such written notice." Addendum B. The actual acceleration, moreover, may occur "without notice or demand." Id. Thus, all that the plain terms of the note require is notice followed by a 15-day cure period. The undisputed facts here establish that First Interstate accelerated the note 17 days after giving notice to Park Meadows. Because the law requires no more than "substantial compliance with [a] notice requirement" (Local No. 1179 v. Merchants Mutual Bonding Co., 613 P.2d 944, 947

(Kan. 1980)), the complaint that the bank failed to provide 15 day's notice is "too meticulous and frivolous to warrant serious consideration." McKegney v. Illinois Surety Co., 155 N.Y.S. 1041, 1043 (N.Y.S.Ct. 1915).[4]

In any event, First Interstate complied with the strictest possible construction of the applicable notice provisions. Even assuming -- as the Beckers and Dougans claim -- that the notice must specify when the 15-day cure period will expire, the January 24, 1986 letter to Park Meadows properly computed that period. Pursuant to the note, "written notice shall be effective as of the time the same is deposited in the United Sataes [sic] Mails addressed to the last known address of the undersigned or the time of the actual receipt thereof, if earlier." Addendum B (emphasis added). It is undisputed that, on January 24, 1986, Park Meadows received formal notice from First Interstate that the note was in default and that, unless the default were cured by February 7,

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4 Accord, Broward County Carpenters Health and Welfare Trust Fund v. Seygo Construction Co., 570 F. Supp. 817, 819 (S.D. Fla. 1983) (rejecting the assertion that notice of nonpayment of certain fringe benefits must "conform to the letter" of statutory notice requirements; notice need only be "adequately given"); Sykes v. Sperow, 179 P. 488, 489 (Ore. 1919) (rejecting the argument that a surety was entitled to discharge because notice was sent to its Portland, Oregon, office rather than its New York City office; "any difference in the mere manner of transmitting it, from the method provided in the contract, . . . [is] merely technical and trivial, and could have caused no injury or prejudice to the defendant"); McKegney v. Illinois Surety Co., 155 N.Y.S. 1041, 1043 (N.Y.S.Ct. 1915) (rejecting argument that hand-delivered, rather than mailed, notice was defective).

the bank would "take the legal actions available . . . under the terms of the loan documents." R. 1193. It is similarly undisputable that, if January 24 is counted as the first effective day of notice -- as it must be under the express terms of the note -- then February 7 is the fifteenth day. The notice provided Park Meadows, therefore, was simply not "defective."

The contrary assertion of the Beckers and Dougans is based upon the submission that "in computing time for the performance of a given act. . . , the courts have employed a method of including either the first or last day and excluding the other." R. 1150, 1151-1153 This, of course, is a general rule of construction that is reflected (among other places) in the Rules of Civil Procedure.[5] General rules and canons of construction, however, do not control when the parties to a contract have specifically provided otherwise. E.g., Utah Code Ann. § 70A-1-102(3)("The effect of provisions of this [Uniform Commercial Code] may be varied by agreement"). Here, the parties expressly provided that, while a 15-day cure period was required prior to acceleration, notice of default would be effective from either the time of mailing or receipt.

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5 See, e.g., Rule 6(a), Utah Rules of Civil Procedure ("the day of the act, event, or default from which the designated period of time begins to run shall not be included"). But see Utah Code Ann. § 70A-1-201(26) (1980)(notice required by the Uniform Commercial Code is effective when it comes to a person's "attention" or is "duly delivered at the place of business").

First Interstate's notice to Park Meadows strictly complied with these requirements.

Based on the foregoing, the summary judgment entered in favor of Park Meadows must be reversed. That motion was founded solely upon the district court's patently erroneous finding that First Interstate failed to give a proper, 15-day notice to Park Meadows. R. 1450-1452. Because First Interstate in fact complied with the notice requirements embodied in the note, the summary judgment entered against First Interstate in favor of Park Meadows must be set aside.

II. THE PURPORTED NOTICE DEFECTS IDENTIFIED BY THE BECKERS AND DOUGANS DO NOT ENTITLE THEM TO DISCHARGE OF THEIR GUARANTY OBLIGATIONS

The bulk of Beckers' and Dougans' presentation below was devoted to developing, in extenso (see R. 1133-1153, 1160-1172), two unremarkable (indeed, undisputed) principles of law: (1) a creditor must give proper notice of its intent to accelerate;[6] and (2) notice of the principal's default must be given to guarantors if a guaranty contains an express notice provision.[7] Unfortunately for the Beckers and Dougans, however, these rules are not applicable here. As shown above, First Interstate gave proper notice of its intent to

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6 E.g., KIXX, Inc. v. Stallion Music Co., 610 P.2d 1385 (Utah 1980); Williamson v. Wanlass, 545 P.2d 1145 (Utah 1976).

7 E.g., Waikiki Seaside Inc. v. Comito, 641 P.2d 1363 (Hawaii App. 1983); Lee v. Vaughn, 534 S.W.2d 221 (Ark. 1976).

accelerate. The guaranty executed by the Beckers and Dougans, moreover, does not contain an express notice requirement and they therefore were not entitled to notice of Park Meadow's default. Restatement of Security § 136 (1941). Accord, Corporation of the President v. Hartford Accident & Indemnity Co., 95 P.2d 736, 745 (Utah 1939); Western States Leasing Co. v. Adturn, 500 P.2d 1190, 1191 (Colo. App. 1972).

Faced with these legal realities, the Beckers and Dougans were forced to argue a series of untenable -- and unsupported -- propositions. First, they claimed that the note was improperly accelerated because the notice of default was sent to Park Meadows rather than PCRC, the original maker of the note. R. 1135-1149. Next, they asserted that an "express" notice requirement could be "implied" into their guaranty. R. 1153-1160. Finally, and underlying the two preceding submissions, was the assumption that any defect in notice -- however slight -- resulted in absolute discharge. R. 1171-1172. The district court, in granting summary judgment, accepted this chain of reasoning. R. 1415. But, while ingenious, this concatenation simply will not bear weight. Notice of First Interstate's intent to accelerate was properly given to Park Meadows, the primary obligor under the note. Express notice provisions cannot be created by implication. And, equally important, even if the Beckers and Dougans established a notice defect, that defect does not

entitle them to absolute discharge. Utah Code Ann. § 57-1-31(1).

A. As The Primary Obligor Under The Note, Park Meadows Was The Proper Entity To Receive Any Notice Required By The Note

The Beckers and Dougans asserted that, because First Interstate "gave notice of intent to accelerate to [Park Meadows], the holder of the note, but elected not to give such notice to PCRC, the maker of the note," First Interstate "effectively waived its right to accelerate the note as to the maker PCRC" and therefore has no claim against them as guarantors. R. 1149. They also claimed that, because they assumed PCRC's obligations under the note, they were entitled to notice as "makers" of the note. R. 1315-1320. But, even beyond obvious technical defects,[8] these arguments -- which were adopted by the district court in granting summary judgment (R. 1415) -- lack merit for at least four reasons. First, notification of PCRC was impossible: the corporation

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8 Park Meadows, of course, was not "the holder of the note." R. 1149. "Holder" is a technical term which refers to the person or entity "entitled to maintain an action at law" on a note. 11 Am Jur 2d § 371 at 395. First Interstate, therefore, is the "holder" of the note. At the time it received notice of default, Park Meadows had the liability of a "maker" because it had assumed the loan. Mr. Becker and Mr. Dougans moreover, simply cannot claim rights due a "maker" of the note. While their assumption of the note gave them primary liability under the note, after the transfer of the note to Park Meadows their status was secondary -- they were sureties no longer liable as principals on the note. At the time of Park Meadow's default, therefore, Mr. Becker and Mr. Dougans did not occupy the position of a "maker."

was dissolved. Second, the Beckers and Dougans had themselves directed First Interstate to deal with Park Meadows. Third, the posited notification requirement ignores commercial reality. Fourth, as the assignee and primary obligor under the note, Park Meadows was the proper entity to receive notice of default.

Just prior to argument of their summary judgment motion, the Beckers and Dougans produced documents demonstrating that PCRC was dissolved on December 21, 1982. These documents, which included articles of dissolution and a certificate from the Utah Department of Business Regulation certifying the dissolution, were presented to the district court. R. 1392-1407. Therefore, even if notice to the original maker of a note were ordinarily a precondition to a creditor's right of acceleration (which it is not), the failure to notify PCRC here would have to be excused because PCRC was no longer in existence. "Under these circumstances, the giving of notice . . . would have been an idle gesture -- a useless thing." Sherman, Clay & Co. v. Turner, 2 P.2d 688, 691 (Wash. 1931).

The law does not, in any event, require notice to PCRC or to the Beckers and Dougans as "makers" prior to acceleration of the note. First Interstate gave notice of default to Park Meadows because it was instructed to do so by Mr. Dougan. Mr. Dougan informed First Interstate that Park

Meadows had assumed the loan, and Dougan directed First Interstate to send further notices regarding the loan to Park Meadows. R. 1271, 1274. Although the Beckers and Dougans knew that the note provided for notice, they intentionally directed First Interstate to deal with and send notices to Park Meadows. Therefore, if any of the parties have "effectively waived [their] right[s]" in this case (R. 1149), the Beckers and Dougans have waived any claimed right to receive notice and they should be estopped from raising any objection to the notice of default given by First Interstate. See American Savings & Loan Ass'n v. Blomquist, 21 Utah 2d 289, 445 P.2d 1 (1968)(waiver is an intentional relinquishment of a known right). The Beckers and Dougans certainly should not be permitted to seize upon First Interstate's compliance with their own directions to escape liability.

In addition to the above, the submission that the original maker and all subsequent assignees of a note must be notified prior to acceleration defies common sense and commercial reality. Commercial notes, such as the one involved in this case, are frequently assigned by both the holders and makers of the instruments. To require the current holder of a note, prior to enforcing its rights against the current primary obligor, to notify the original maker as well as all mesne assignees would impose an impractical -- and often futile -- obligation. For one thing, the holder of a

note may not have accurate records -- nor any means of obtaining accurate records -- of intermediate transfers. In this case, for example, although the Beckers and Dougans assert that Park Meadows assumed the loan (R. 1180), First Interstate has never received any documentation to support the claimed assumption. Moreover, providing notice to the original maker and subsequent assignees will often be futile. As in this case, the original maker (and subsequent assignees) may no longer exist. Therefore, the notice requirement posited by the Beckers and Dougans, and adopted by the district court, needlessly encumbers the utility of commercial paper.

Finally, notification of the original maker and all intermediate assignees is not required under well-established principles of contract law. The Beckers and Dougans assert that they assumed the note from PCRC, and that Park Meadows subsequently assumed the note from them. Accordingly, First Interstate was free to deal with Park Meadows as the primary obligor under the note. The Second Restatement of Contracts § 328 states the general principles of law governing the assignment of contracts as follows:

> (1) Unless the language or the circumstances indicate the contrary, . . . an assignment of "the contract" or of "all my rights under the contract" or an assignment in similar general terms is an assignment of the assignor's rights and a delegation of his unperformed duties under the contract.

> (2) Unless the language or the circumstances indicate the contrary, the acceptance by an assignee of such an assignment operates as a promise to the assignor to perform the assignor's unperformed duties, and the obligor of the assigned rights is an intended beneficiary of the promise.

Under the principles set forth in § 328 above, the respective assumption agreements involving the note operated as "an assignment of the assignor[s'] [e.g., PCRC's, the Beckers' and the Dougans'] rights and a delegation of [their] unperformed duties under the contract." To the extent that PCRC and the Beckers and Dougans had a right to notice as makers of the note, they assigned this right to Park Meadows at the time Park Meadows assumed the note. First Investment Company v. Andersen, 621 P.2d 683, 686 (Utah 1980)("Since the notes were not negotiable, the transfer by the Nursery to plaintiff must be deemed an assignment, and the assignee (plaintiff) stood in the shoes of the assignor"). Moreover, as an intended beneficiary of the assumption agreements, First Interstate had the power to enforce the terms of the note directly against Park Meadows. Second Restatement of Contracts § 304 (1979)("A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty"). Accord, Tracy Collins Bank & Trust v. Dickamore, 652 P.2d 1314, 1315 (Utah 1982). It is undisputed that Park Meadows

did receive the notice called for in the note and, consequently, the note was properly accelerated.

B. The Beckers And Dougans Were Not Entitled To Notice As Guarantors Of The Note

In addition to arguing improper acceleration, the Beckers and Dougans asserted that their guaranty obligations were discharged because First Interstate failed to provide them with adequate notice of Park Meadow's default. R. 1160-1171. This submission is unavailing. The Beckers' and Dougans' guaranty was absolute and unconditional. As such, First Interstate was not obligated to provide them with notice of Park Meadows' default. Restatement of Security § 136 (1941). The defendants' attempt to import a notice provision into the guaranty (R. 1153-1160), moreover, is unpersuasive. Indeed, numerous courts -- including the Utah Supreme Court -- have repeatedly rejected the precise argument proffered by the Beckers and Dougans. E.g., Corporation of the President v. Hartford Accident & Indemnity Co., 95 P.2d 736, 745 (Utah 1939); Western States Leasing Co. v. Adturn, Inc., 500 P. 2d 1190, 1191 (Colo. App. 1972).

1. Absent an express contractual notice requirement, guarantors are not entitled to notice of the principal obligor's default

"All courts agree that if the contract of guaranty affirmatively calls for notice, it is a condition which must

be met in order to bind the guarantor on his promise." Electric Storage Battery Co. v. Black, 134 N.W.2d 481, 483 (Wis. 1965). If the guaranty does not contain an express notice requirement, however, the rule is exactly the contrary. Unless notice is "required by the terms of the surety's contract," a guarantor's "obligation to the creditor is not affected by the creditor's failure to notify him of the principal's default." Restatement of Security, § 136. Accord, Corporation of the President v. Hartford Accident & Indemnity Co., 95 P.2d 736, 745 (Utah 1939)(sureties are "not entitled to any notice of default unless the agreement specifically provides therefore")(emphasis added); Waikiki Seaside Inc. v. Comito, 641 P.2d 1363, 1364-1365 (Hawaii App. 1982)(a guarantor is entitled to notice only where required by the terms of the guaranty). The rationale for this rule is set forth in Comment (a) to § 136 of the Restatement of Security:

> The rule stated in this Section is an application of the usual rule of contracts that an obligor is not discharged because he is not notified that the time for his performance is due, unless he has stipulated for notification. The surety, when he undertakes his obligation, must realize that there is a risk that the principal will not perform. If the surety wishes notification, he can insert a requirement for it in his contract.

This rule, and its supporting rationale, has been consistently articulated and applied by courts throughout the country.[9]

The guaranty executed by the Beckers and Dougans does not explicitly call for notice to the guarantors of the principal obligor's default. The guaranty, by its terms, does not provide any condition precedent to the obligation of the

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9 Lee v. Vaughn, 534 S.W.2d 221, 223-224 (Ark. 1976)(quoting Restatement of Security § 136)("'the surety's obligation to the creditor is not affected by the creditor's failure to notify him of the principal's default unless such notification is required by the terms of the surety's contract'")(emphasis in original); Bowyer v. Clark Equipment Co., 357 N.E.2d 290, 293 (Ind. App. 1976)("a guarantor is not entitled to notice of his principal's default when his undertaking to answer for his principal's debts and obligations is absolute"); Dewey v. Henry's Drive-Ins of Minnesota, Inc., 222 N.W.2d 553, 556 (Minn. 1974)(quoting Midway National Bank v. Gustafson, 165 N.W.2d 218, 223 (Minn. 1968))("Our decisions do not support a holding that apart from contract a [creditor] has a duty to inform a guarantor of the [principal's] default. . . . '[T]he creditor is not obliged to look after the interests of the surety; ordinarily, it is up to the surety to see to it that the principal performs his duty'"); Orkin Exterminating Company Inc. v. Stevens, 203 S.E.2d 587, 593 (Ga. App. 1973)(failure to give notice is a defense only where contract expressly requires notice); Walker v. Mississippi Menhaden Products, Inc., 136 So.2d 607, 609 (Miss. 1962)(an absolute guaranty "required no notice of default or demand"); American Tobacco Company v. Chalfen, 108 N.W.2d 702, 704-705 (Minn. 1961)(absolute guaranty requires no notice of default); Bloom v. Bender, 313 P.2d 568, 572 (Cal. 1957)(a guarantor's "contention that notice to her of [the principal's] default in payment was a condition precedent to liability is without merit. Neither the law nor the subject agreement requires such notice"); Beach v. Beach, 107 A.2d 629, 633 (Conn. 1954)("The guarantee was unconditional and absolute, and no notice of default or demand was necessary"); In re Bitker's Estate, 30 N.W.2d 449, 452 (Wis. 1947)("No notice of default in the performance of a contract by the principal party thereto is necessary in order to hold the guarantor to the contract"); Ray v. Spencer, 208 S.W.2d 103, 104 (Tex. Civ. App. 1947)("The contract here being an unconditional or absolute guarantee, no notice of the default was required to fasten liability on this guarantor"); Yama v. Sigman, 165 P.2d 191, 193 (Colo. 1945)(notice of the principal's default must be given to the guarantor where required "by the express terms of the guaranty"); Robey v. Walton Lumber Co., 135 P.2d 95, 102 (Wash. 1943)("In order to bind the guarantor under an absolute guaranty it is not necessary that there should be . . . notice of the default of the principal")(quoting 28 C.J. 895-896); Perry v.

Footnote continued on next page.

Beckers and Dougans other than default of the principal obligor. The guaranty simply states that the guarantors "jointly and severally guarantee payment of this Promissory Note (Secured By Deed of Trust) and further guarantee payment of the entire indebtedness evidenced thereby and the Deed of Trust securing the same." Addendum B. The guaranty, therefore, is unconditional and absolute. Valley Bank & Trust v. Rite Way Concrete Forming, Inc., 742 P.2d 105, 108 (Utah App. 1987), cert. denied, 765 P.2d 1277 (Utah 1988)("A guaranty of the payment of an obligation, without words of limitation or condition, is construed as an absolute or unconditional guaranty").[10] If the Beckers and Dougans

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Cohen, 11 A.2d 804, 805 (Conn. 1940)(quoting City Savings Bank v. Hopson, 5 A. 601, 602 (Conn. 1886))("'Upon non-payment at maturity it became, and has since continued to be, their [the guarantors'] duty to go to the holder and pay it, and this without demand or notice.' . . . In such a case there is no burden upon the holder of the note to do anything as regards the guarantor, but the burden is on the latter to ascertain the fact of nonpayment and take the necessary steps to protect his other interest").

10 Accord, Robey v. Walton Lumber Co., 135 P.2d 95, 102 (Wash. 1943)(quoting Sherman, Clay & Co. v. Turner, 2 P.2d 688, 690 (Wash. 1931)(emphasis and ellipsis in original)("'An absolute guaranty is one by which the guarantor unconditionally promises payment or performance of the principal contract on default of the principal debtor or obligor, the most usual form of an absolute guaranty being that of payment. * * * A guaranty is deemed to be absolute unless its terms import some condition precedent to the liability of the guarantor'"); Sherman, Clay & Co. v. Turner, 2 P.2d 688, 689 (Wash. 1931)(a guaranty consisting simply of the words "Payment Guaranteed" constitutes an absolute, unconditional guaranty); Walker v. Mississippi Menhaden Products, Inc., 136 So.2d 607, 608 (Miss. 1962)(contractual language that the "Guarantor, will and does hereby guarantee the full performance and fulfillment by the Boat Owner of all duties, obligations, and responsibilities imposed upon the Boat Owner by this agreement" is "an absolute guaranty").

desired notification, they should have inserted such a stipulation into the guaranty before they executed it. Corporation of the President v. Hartford Accident & Indemnity Co., 95 P.2d 736, 745 (Utah 1939). However, because their unconditional guarantee does not call for notice of the principal's default, the Beckers' and Dougans' obligations to First Interstate are not affected by any "failure to notify [them] of the principal's default." Restatement of Security, § 136.

2. Guarantors cannot create an express right to notice by inference

In an attempt to avoid the plain import of the foregoing authority, the Beckers and Dougans argued below that an express notice provision could be imported into the guaranty by reading it "together" with the terms of the note. R. 1153-1160. The district court apparently adopted this reasoning. R. 1415. An "express" right to notice, however, cannot be "implied" into the terms of a guaranty. Indeed, the Beckers' and Dougans' submission is controverted by the very rule of contract construction they invoke and has been rejected by numerous courts -- including the Utah Supreme Court.

First Interstate does not dispute that, as a general rule, "[w]here two or more instruments are executed by the same parties contemporaneously, or at different times in the

course of the same transaction, and concern the same subject matter, they will be read and construed together." Big Cottonwood Tanner Ditch Co. v. Salt Lake City, 740 P.2d 1357, 1359 (Utah App. 1987), cert. denied, 765 P.2d 1277 (Utah 1988)(emphasis added)(quoting Bullfrog Marina, Inc. v. Lentz, 501 P.2d 266, 271 (Utah 1972)).[11] But, however well-established the foregoing rule, it simply does not apply to the construction of the guaranty at issue here.

To begin with, the note and guaranty were not executed by the same parties. Only PCRC, through its president, signed the note, while the Beckers, Dougans and Ayers individually signed the guaranty. Nor does the guaranty deal with the same subject matter as the note. As a matter of law, a guarantor -- whose liability arises only in the event of the principal's default -- assumes obligations wholly independent of the maker of a note. Amick v. Baugh, 402 P.2d 342 (Wash. 1965). Courts, therefore, are obliged to consider a contract of guaranty and an underlying note as separate obligations. Component Systems v. Eight Judicial District Court, 692 P.2d 1296, 1299 (Nev. 1985). As the Washington Supreme Court succinctly put it:

> The debtor is not a party to the guaranty, and the guarantor is not a party to the principal obligation. The undertaking of the former is

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11 See also First Security Bank of Utah v. Maxwell, 659 P.2d 1078, 1080 (Utah 1983); Bullfrog Marina, Inc. v. Lentz, 501 P.2d 266, 271 (Utah 1972); Verhoef v. Aston, 740 P.2d 1342, 1344 (Utah App. 1987).

> independent of the promise of the latter; and the responsibilities which are imposed by the contract of guaranty differ from those which are created by the contract to which the guaranty is collateral. The fact that both contracts are written on the same paper or instrument does not affect the independence or separateness of the one from the other.

Robey v. Walton Lumber Co., 135 P.2d 95, 102 (Wash. 1943)(quoting 24 Am Jur. 875, 876 § 4).

Because a contract of guaranty is separate and independent of the underlying obligation, courts have repeatedly refused to accept the identical argument propounded by the Beckers and Dougans. In Western States Leasing Co. v. Adturn, Inc., 500 P.2d 1190, 1191 (Colo. App. 1972), the guarantor of a defaulted lease agreement claimed that the lessor's failure to notify him of the lessee's default released him from his guaranty. The guaranty at issue, like the one in this case, was absolute in terms.[12] The lease, however, (like the note here) provided for default notice to the lessee. Based on reasoning identical to that proposed by the Beckers and Dougans, the trial court released the

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12 The guaranty provided:

> "[Turner] does guaranty to said Lessor, its successors and assigns that any and all rent or rents which shall become due under the provisions of the above described lease shall be paid in full when due, and the undersigned does hereby acknowledge to be personally obligated to pay said rents together with interest thereon as specified under the lease at the due date thereof."

guarantor from his obligation. The Colorado Court of Appeals reversed.

The reasoning of the court of appeals is directly applicable to this case (500 P.2d at 1191):

> [T]here is no basis for implying that timely notice of default should have been given to [the guarantor] before liability could be imposed under the guaranty. Where a contract of guaranty provides that notice of default of the principal debtor must be given to the guarantor, such notice must be given for the guarantor to be liable. Yama v. Sigman, 114 Colo. 323, 165 P.2d 191. However, where an unambiguous, absolute guaranty is silent as to notice and the maximum amount guaranteed is determinable at the time the guarantee [sic] is entered into, as in the case at hand, there is no basis to imply a requirement of notice.

Thus, the court of appeals concluded that the trial court erred by "resort[ing] to the language of the lease to construe the guaranty as to any limiting conditions." 500 P.2d at 1191.

Other courts, on analogous facts, have reached the same conclusion as the court in Western States Leasing. Robey v. Walton Lumber Co., 135 P.2d 95, 102-103 (Wash. 1943)(a guarantor is not entitled to incorporate into his guaranty the contractual provisions of an underlying deed of trust -- even though those provisions excuse performance by the primary obligor; "We are satisfied, as stated, that at the time this action was brought, the principal obligor was in default in the payment of principal and interest due on the bonds, and it

appearing that Clyde Walton had unconditionally guaranteed the payment of the principal and interest on the bonds when due, these respondents are not prohibited from bringing this action on the guaranty, regardless of their inability to proceed against the principal obligor"); Mortgage & Contract Co. v. Linenberg, 244 N.W. 428, 430-432 (Mich. 1932)(guarantor of a land purchase contract is obligated to perform under her guaranty even though she did not receive notice that the debt had been accelerated against the primary obligor; "Mrs. Obenauer's guaranty that the vendee would 'faithfully perform said contract' included payment under this acceleration clause just as much as it included payment of the monthly installments" and "[i]f Mrs. Obenauer desired notice of the vendee's default as a condition precedent to her being held liable under the acceleration clause or as a condition precedent to suit on her guaranty, it should have been so provided in the contract of guaranty itself").

The result reached by the above courts is mandated here. The guaranty executed by the Beckers and Dougans is absolute and unambiguous. This Court, therefore, may not use a notice provision in favor of the maker of the note to imply a notice provision in favor of the guarantors. Any doubts regarding the propriety of this result are dispelled by the decision of the Utah Supreme Court in Corporation of the

President v. Hartford Accident & Indemnity Co., 95 P.2d 736, 745 (Utah 1939).

In Corporation of the President, the Church of Jesus Christ of Latter-day Saints sued a surety on a contractor's bond based upon the contractor's failure to perform. As in this case, the church's contract with the primary obligor required express notice of default to the primary obligor. The surety bond, in turn, was silent on that issue. As in this case, therefore, the surety argued that the notice provision in favor of the primary obligor required notice to the surety of the primary obligor's default. The Utah Supreme Court rejected that assertion with language that requires reversal of the district court (95 P.2d at 745):

> The contract and bond do not provide for any notice to the Surety. It is arguable that, in view of such failure, there should be an implication that notice to the [primary obligor] was for the benefit of the Surety. But sureties in building contracts are not entitled to any notice of default unless the agreement specifically provides therefore.

Guarantors are not entitled to notice of a principal's default absent express stipulation to the contrary. Restatement of Security § 136; n. 9, supra. There is no such stipulation here. Courts may not create express notice provisions by incorporating the terms of the underlying obligation into the guaranty. Corporation of the President, supra; Western States Leasing, supra; Robey v. Walton Lumber

Co., supra; Mortgage & Contract Co. v. Linenberg, supra. The Beckers and Dougans, therefore, were not entitled to advance notice of Park Meadow's default prior to acceleration.

Finally, even if this Court were to refer to the note in construing the guaranty, the note offers little comfort to the Beckers and Dougans. The 15-day cure period invoked by the defendants applies to the maker of the note. The only express note provision that applies to "guarantors" provides that the "guarantors . . . severally waive . . . notice of nonpayment." Addendum B. As a result, reading the guaranty "together" with the note is, in fact, fatal to the defendants' position. Waikiki Seaside Inc. v. Comito, 641 P.2d 1363, 1365 (Hawaii App. 1982)("In this case, the guaranty was absolute in form and bound defendants without notice of their acceptance. Notice of default is clearly waived; hence, there was no requirement to give such notice"). Accordingly, the district court's discharge of the Beckers' and Dougans' guaranty obligations must be reversed.

C. Even If The Beckers And Dougans Were Entitled To Notice, Their Claimed Right To Discharge Lacks Merit

Even if there existed a viable legal theory under which the Beckers and Dougans as guarantors were entitled to notice of their principal's default, failure to receive such notice does not entitle them to absolute discharge. The Beckers' and Dougans' contrary submission, adopted without

discussion by the district court (R. 1415-1416), ignores the fundamental principle that impairment of a surety's rights does not "have the effect of discharging the surety altogether, but, rather, discharges him pro tanto, that is, to the extent to which he has been injured." 72 C.J.S. Principal and Surety, § 159 at 298. The record here unequivocally establishes that the Beckers and Dougans could not have been injured by the claimed lack of notice.

It is well established that failure to give required notice to a surety results in discharge only to the extent the surety is prejudiced by the omission. Section 137 of the Restatement of Security provides that, if a surety is entitled to notice, "and if such notice is not given, the surety is discharged to the extent of resulting prejudice." This rule is uniformly reflected in the decided cases.[13] Application of this rule to the Beckers and Dougans requires reversal of the district court because, even assuming they were entitled to

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13 Zion's First National Bank v. Hurst, 570 P.2d 1031, 1033-1034 (Utah 1977)(failure to give adequate notice releases a debtor to the extent of "any loss caused by the failure to so notify"); Corporation of the President v. Hartford Accident & Indemnity Co., 95 P.2d 736, 739 (Utah 1939)(failure to comply with terms of a guaranty does not release the guaranty absolutely "but only to the extent to which it has been prejudiced or has suffered damage by the non-compliance"); Electric Storage Battery Co. v. Black, 134 N.W.2d 481, 487 (Wis. 1965)(surety discharged only to extent that delay in notification results in prejudice); Piasecki v. Fidelity Corp. of Michigan, 63 N.W.2d 671, 676 (Mich. 1954)(quoting Palmer v. Schrage, 242 N.W. 751 (Mich. 1932))(if a guarantor is entitled to notice and "if such notice was not given, and defendants in consequence thereof were damaged, they would be released pro tanto from their guaranty").

notice of Park Meadow's default, failure to receive that notice did not result in cognizable injury.

The Beckers and Dougans could have been injured by lack of notice only if they would have cured Park Meadow's default within the 15-day cure period provided by the note. To meet this burden of proof, Dougan asserts that he and "Frederick G. Becker III were willing and able to cure the default on the Racquet Club Note in the first months of 1986, and would have done so if they had received timely notice of the default." R. 1198-1199. What this submission ignores, however, is the fact that -- even if First Interstate somehow wrongfully deprived them of the 15-day cure period established by the note -- the Beckers and Dougans nevertheless failed to take advantage of a subsequent three-month statutory cure period.

Utah Code Ann. § 57-1-31(1) provides that, where a debt secured by a deed of trust has been accelerated, "the trustor or his successor in interest . . . or any other person having a subordinate lien or encumbrance of record thereon . . . at any time within three months of the filing for record of notice of default under such trust deed, if the power of sale is to be exercised, may pay to the beneficiary . . . the entire amount then due under the terms of such trust deed . . . other than such portion of the principal as would not then be due had no default occurred, and thereby cure the default.

. . ." Invocation of the three-month cure period established by Utah Code Ann. § 57-1-31 "suspends the right to sell under the power of sale and has the effect of suspending application of the acceleration clause if it was triggered by the default." I Summary of Utah Real Property Law 399-400 (J. Reuben Clark Law School 1978).

On February 10, 1986, First Interstate executed a statutory notice of default accelerating the sum payable under the note. This notice was recorded on February 14, 1986. Accordingly, as guarantors of Park Meadow's obligations under the deed of trust, the Beckers and Dougans had three months from February 14, 1986 to cure Park Meadow's default by paying the unaccelerated sums past due under the note. See Utah Code Ann. § 57-1-31(2)(cancellation of a notice of default can be requested by "any person having an interest in the trust property"). They did not do so and, as a result, any claim of prejudice here is baseless.

The Beckers and Dougans admit that they received a copy of the statutory notice of default shortly after February 21, 1986. R. 1132-1133. They have also asserted that they "were willing and able to cure the default on the Racquet Club Note in the first months of 1986." R. 1198. But, no matter how one defines the "first months of 1986" (id.), those months would necessarily include all of February 1986. The Dougans and Beckers, therefore, were not injured by the alleged lack

of notice because, by their own admission, they could have cured the default -- if they in fact had been of a mind to do so -- for a three-month period following receipt of the notice of default pursuant to Utah Code Ann. § 57-1-31. The Beckers' and Dougans' failure to cure Park Meadow's default during this statutory cure period establishes beyond peradventure that their "loss" of the 15-day contractual cure period did not result in any actual prejudice: despite their assertions to the contrary (R. 1198-1199), the guarantors obviously lacked either the will or the ability to cure Park Meadow's default at any time "during the first months of 1986." Id.

III. BECAUSE THEIR DEFENSES ARE INSUFFICIENT AS A MATTER OF LAW, FIRST INTERSTATE IS ENTITLED TO PARTIAL SUMMARY JUDGMENT ESTABLISHING THE LIABILITY OF THE BECKERS AND DOUGANS

In addition to the notice arguments addressed above, the Beckers and Dougans have asserted that First Interstate discharged their guaranty obligations by "unjustifiably impairing the collateral securing the note and by releasing" one of the partners of Park Meadows, Enoch Smith. R. 114. These defenses, however, are devoid of merit. Indeed, because these defenses -- like the notice submissions -- are insufficient as a matter of law, First Interstate is entitled to partial summary judgment establishing the liability of the Beckers and Dougans.

The claim that First Interstate released the Beckers and Dougans by impairing the collateral securing the note is without basis in fact or law. It is undisputed that the racquet club property was the only collateral securing the note. The entire proceeds from the sale of that property, moreover, were applied to the note. R. 756-757. In these circumstances, an impairment of collateral defense lacks any foundation.

The defense based upon the purported release of a Park Meadows partner is likewise chimerical. This defense is based entirely upon paragraph five of the loan work-out agreement executed between Park Meadows, First Interstate, and First Security. Addendum C. That paragraph provides that Enoch Smith, a partner of Park Meadows "will be released from whatever personal liability may exist on the FSB [First Security] debt, FIUT's [First Interstate's] PMD [Park Meadows], Enoch Smith Co. and Smith Park Acres Loans and the 'Ayers' loan." Addendum C, ¶ 5. The only wording in this paragraph that even arguably relates to a release under the note is the language referring to "FIUT's PMD . . . loan." Id.[14] First Interstate contends that this language does not

14 The Enoch Smith Co., Smith Park Acres and "Ayers" loans clearly do not refer to the note.

refer to the note.[15] But, even assuming that paragraph five does refer to the note, paragraph five does not -- as a matter of law -- release the guarantors of the note from liability.

To begin with, the release of a partner does not release either the partnership or the guarantors of the partnership's debt. Under Utah law, partnerships are separate entities from the partners. For example, while a partner has an equal right with his partners to possess specific partnership property for partnership purposes, a partner has no right to possess such property for other purposes. Utah Code Ann. § 48-1-22(2)(a) (1989). Partnership assets also cannot be used to satisfy an individual partner's obligations without a charging order. Utah Code Ann. § 48-1-25 (1989). Similarly, although partners are liable for partnership debts, the assets of the partnership must first be exhausted before creditors can reach the individual assets of the partner. Utah Code Ann. § 48-1-37 (1989). Consequently, the release of a partner does not release the partnership and -- without release of the partnership -- any claimed basis for release of the partnership's guarantors disappears.

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15 At the time the work-out agreement was executed, Park Meadows owed First Interstate on two secured and three unsecured loans related to the development of the Park Meadows golf course. These loans were the "PMD . . . loans" referred to in paragraph five. Indeed, these loans -- but not the note -- were subsequently released by separate documents implementing the terms of the work-out agreement. R. 787-795.

But, even if release of a partner could somehow be construed as a release of the partnership, any defense based on the work-out agreement is still legally deficient because paragraph five does not constitute a present release of anyone. Paragraph five states that Enoch Smith "will be released" (Addendum C ¶ 5)(emphasis added); it does not provide that Smith "is hereby released" -- wording that would be expected if paragraph five effected a present release. Indeed, paragraph five of the agreement is no more a release of Enoch Smith than paragraph four is a blanket mortgage or paragraph two a $1 million loan. Moreover, the agreement expressly provides that its terms, including paragraph five, will be implemented "[a]t the contemplated closing." Addendum C ¶ 1. In fact, one of the partners of Park Meadows who negotiated the work-out agreement characterized the agreement as "just an outline." Deposition of Enoch Richard Smith, Vol. 1 at 115.

As such, the work-out agreement merged with and was superseded by the closing documents that gave effect to its provisions.[16] And, while these closing documents did limit

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16 National Surety Corp. v. Christiansen Bros., Inc., 29 Utah 2d 460, 511 P.2d 731, 733 (1973)("where parties engage in negotiations concerning a transaction, pursuant to which they enter into a written contract, it is presumed that all matters relating to the subject are merged in and constitute a complete integration of their agreement"); Mawhinney v. Jensen, 120 Utah 142, 232 P.2d 769, 774 (1951)(a final contract represents "the final meeting of the minds, and in it are merged all the terms expressing the final intentions of the parties and any augmentations. If there are inconsistencies between the terms of the

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First Interstate's recourse against Enoch Smith and Margaret Smith on certain specified loans, the racquet club note was not included among those enumerated loans. R. 782, 787-788, Addendum D at ¶ 1, attached. Thus, because the only release that was actually effectuated did not apply to the note guaranteed by the Beckers and Dougans, their "release" defense fails as a matter of law.

Finally, even assuming (contrary to the above) that release of a partner releases the partnership and that First Interstate effected a present release of Park Meadows, the Beckers and Dougans would not be discharged from their guaranty because they have been fully indemnified by the partners of Park Meadows. "In the few cases that have arisen, it has been held that a release of the principal does not discharge a surety if he is indemnified." L. Simpson, Handbook on the Law of Suretyship 304 (1950). Accord, F. Childs, Law of Surety and Guaranty 251 (1907)("If the surety be fully indemnified, the rule [that a release of the principal will discharge the surety] does not apply, as the surety in such a case occupies the position of a principal, and cannot be injured by the principal's release"). This rule

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Footnote continued from previous page.
preliminary and final contracts, those of the latter will ordinarily govern"); Beck v. Megli, 153 Kan. 721, 114 P.2d 305, 309 (1941)(a memorandum agreement to lease and purchase a mill merged into a contract that was executed several days later because the contract set out in detail the terms of the lease and purchase).

-- founded upon common-sense recognition of the fact that an indemnified surety is not harmed by release of the principal because the surety still has recourse against the principal on the indemnification (id.) -- absolutely precludes the Beckers' and Dougans' invocation of any defense based upon a purported release of Park Meadows or its partners.

Dougan and Becker chose to exchange their interest in the racquet club with Park Meadows. They did not obtain a novation. Consequently, they knew that they remained liable on their guaranty of the racquet club note. To protect themselves from this liability, they obtained a full indemnity from Park Meadows and its individual partners.[17] Dougan and Becker knew that, if Park Meadows did not perform, they would have to pay the note and attempt to collect from Park Meadows and its partners. This is precisely the position they occupy today. Park Meadows has not performed on the note. Therefore, regardless of any purported "release" of Park Meadows, the Dougans and Beckers remain liable on the guaranty and must look to Park Meadows and its partners on their indemnity.

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17 See R. 1182. The indemnity agreement executed by Park Meadows and its partners as individuals on August 31, 1981 provided that Park Meadows would "indemnify and hold harmless J. Lynn Dougan and Frederick G. Becker II with regard to any and all obligations, damages or claims with regard to a certain Promissory Note dated December 11, 1978 in the amount of $800,000 secured by Deed of Trust covering property known as the Park City Racquet Club." R. 1182.

IV. THE DEPOSITION EXPENSES CLAIMED BY THE BECKERS AND DOUGANS CANNOT BE RECOVERED AS "COSTS" UNDER RULE 54(d)(2), UTAH RULES OF CIVIL PROCEDURE

Rule 54(d)(2), Utah Rules of Civil Procedure, authorizes a prevailing party to recover certain costs (including filing fees and stenographic costs) so long as "the disbursements have been necessarily incurred in the action or proceeding." After prevailing on their summary judgment motion, the district court awarded the Beckers and Dougans the costs incurred in taking 12 depositions -- even though those depositions were not necessary to (or even used in support of) their motion. If this Court reverses the lower court's judgment, it will not be necessary to address the propriety of this award. If this Court affirms, however, the award of costs entered below should be reversed.

The Utah Supreme Court has consistently held that costs for the taking of depositions will not be awarded unless they are "essential for the development and presentation of the case" (Highland Construction Co. v. Union Pacific Railroad Co., 683 P.2d 1042, 1051 (Utah 1984)), and are actually used at trial. Nelson v. Newman, 583 P.2d 601, 604 (Utah 1978). In Nelson, the Utah Supreme Court upheld the lower court's decision not to award costs for the taking of depositions which were not used during the trial and which defendants failed to demonstrate were necessary to the preparation of their case. Id.

Although several of the depositions for which the Beckers and Dougans were awarded costs involved issues totally unrelated to the original issuance of the note,[18] the bulk of the depositions were taken of individuals who were involved with either the negotiation, execution or administration of the note. R. 1457-1459. For this reason, the Beckers and Dougans can accurately claim that the depositions had some general "relevance" to their case. But general "relevance" is not enough. To recover on the 12 depositions, they must establish that the discovery for which they seek reimbursement was necessary or essential to their summary judgment motion. Rule 54(d)(2); Highland Construction Co., supra; Nelson v. Newman, supra. That showing cannot be made here.

The Beckers and Dougans prevailed below on an exceedingly narrow cluster of issues: whether First Interstate gave proper notice of its intent to accelerate, whether First Interstate erred in giving that notice to Park Meadows rather than PCRC, and whether First Interstate erred by not giving notice of default to the Beckers and Dougans. Their motion did not rely whatsoever on the 12 depositions for

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18 One of the depositions, that of Douglas Matsumori, involved an attorney who represented First Security Bank in loan work-out negotiations with Park Meadows. Mr. Matsumori, as a representative of a party adverse to First Interstate, obviously had absolutely no involvement in drafting or accelerating the note at issue here. At least two other depositions (Wayne Grey Petty, Mark D. Howell) also dealt primarily with loan work-out discussions unrelated to the execution or acceleration of the note.

which they were awarded costs. As the pleadings filed in support of their motion demonstrate, the Beckers' and Dougans' motion was based solely on the language of the note -- a document that has been available to them since the commencement of this action -- and affidavits prepared exclusively for the motion. R. 1124-1202; 1302-1351. The arguments found dispositive below, therefore, were available to the defendants since the commencement of this action. The Beckers and Dougans are not entitled to recover costs relating to the development of other aspects of the case simply because they chose to postpone raising their "notice" arguments.

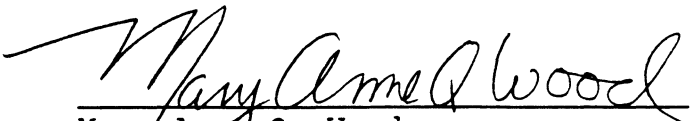
CONCLUSION

The Beckers and Dougans executed an absolute and unconditional guaranty in favor of a predecessor of First Interstate in order to secure financing of a venture controlled by them. That venture turned sour, resulting in significant losses. The Beckers and Dougans, by means of the technical defenses and arguments discussed above, have attempted to shift those losses from their own shoulders onto the backs of First Interstate and its shareholders. This Court should not countenance such a result. None of the defenses raised by the Beckers and Dougans -- whether based on a claimed lack of notice, impairment of collateral, or release of Park Meadows -- have any legal merit. Accordingly, the judgment of the district court should be reversed, and the

Court should enter partial summary judgment in favor of First Interstate establishing the Beckers' and Dougans' liability as guarantors. The Court should then remand this case for determination of the final amount due under the note.

Respectfully submitted,

HOLME ROBERTS & OWEN



Mary Anne Q. Wood
Richie D. Haddock
Richard G. Wilkins
Attorneys for Plaintiff/
Appellant First Interstate
Bank

NOVEMBER 22, 1989

ADDENDUM A

Utah Code Ann. § 57-1-31 (1986) provides:

> (1) Whenever all or a portion of the principal sum of any obligation secured by a trust deed has, prior to the maturity date fixed in such obligation, become due or been declared due by reason of a breach or default in the performance of any obligation secured by the trust deed, including a default in the payment of interest or of any installment of principal, or by reason of failure of the trustor to pay, in accordance with the terms of the trust deed, taxes, assessments, premiums for insurance, or advances made by the beneficiary in accordance with terms of such obligation or of such trust deed, the trustor or his successor in interest in the trust property or any part thereof or any other person having a subordinate lien or encumbrance of record thereon or any beneficiary under a subordinate trust deed, at any time within three months of the filing for record of notice of default under such trust deed, if the power of sale is to be exercised, may pay to the beneficiary or his successor in interest the entire amount then due under the terms of such trust deed (including costs and expenses actually incurred in enforcing the terms of such obligation, or trust deed, and the trustee's and attorney's fees actually incurred) other than such portion of the principal as would not then be due had no default occurred, and thereby cure the default theretofore existing and, thereupon, all proceedings theretofore had or instituted shall be dismissed or discontinued and the obligation and trust deed shall be reinstated and shall be and remain in force and effect the same as if no such acceleration had occurred.

(2) If the default is cured and the trust deed reinstated in the manner provided in Subsection (1), the beneficiary, or his assignee, shall, on demand of any person having an interest in the trust property, execute and deliver to him a request to the trustee to execute and deliver to him a request to the trustee to execute, acknowledge, and deliver a cancellation of the recorded

notice of default under such trust deed; and any beneficiary under a trust deed, or his assignee, who, for a period of 30 days after such demand, refuses to request the trustee to execute and deliver such cancellation is liable to the person entitled to such request for all damages resulting from such refusal. A release and reconveyance given by the trustee or beneficiary, or both, or the execution of a trustee's deed constitutes a cancellation of a notice of default. Otherwise, a cancellation of a recorded notice of default under a trust deed is, when acknowledged, entitled to be recorded and is sufficient if made and executed by the trustee in substantially the following form: [form for Cancellation of Notice of Default omitted].

Rule 54(d)(2), Utah Rules of Civil Procedure,

provides:

> The party who claims his costs must within five days after the entry of judgment serve upon the adverse party against whom costs are claimed, a copy of a memorandum of the items of his costs and necessary disbursements in the action, and file with the court a like memorandum thereof duly verified stating that to affiant's knowledge the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed may, within seven days after service of the memorandum of costs, file a motion to have the bill of costs taxed by the court in which the judgment was rendered.

A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, shall nevertheless be considered as served and filed on the date judgment is entered.

ADDENDUM B

PROMISSORY NOTE

(SECURED BY DEED OF TRUST)

FOR VALUE RECEIVED, the undersigned promises and agrees to pay to the order of WALKER BANK & TRUST COMPANY (hereinafter termed "Walker") or its assigns, at the main office of Walker, Salt Lake City, Utah, or at such other place as the holder hereof may designate in writing, the principal sum of Eight Hundred Thousand Dollars ($800,000.00) in lawful money of the United States of America, together with interest on the unpaid balance thereof at the rate of eleven percent (11%) per annum until paid. Principal and interest shall be paid in equal monthly installments of Seven Thousand Eight Hundred Forty-One Dollars ($7,841.00) each commencing with a payment on the 1st day of January, 1979, and continuing with a like payment on the first day of each succeeding calendar month thereafter until the entire remaining unpaid balance of principal and interest has been paid in full; provided, however, that the final payment hereunder shall be in an amount equal to the then remaining unpaid balance. Installments shall be applied first toward the payment and satisfaction of accrued and unpaid interest and the remainder shall be applied toward the reduction of principal. Interest for each monthly payment and period shall be computed on a 360-day year basis. Interest, if any, which accrues during the period commencing with the date of this Note and ending prior to the date of the first installment due hereunder shall be deducted from the proceeds of the loan evidenced hereby.

The undersigned shall have the option to prepay all or any portion of the unpaid principal balance of the Note in any one (1) year without penalty. In the event the undersigned shall exercise such option, the same shall not relieve the undersigned nor waive any obligation of the undersigned to make timely monthly installment payments thereafter maturing. Walker or its assigns shall, at any time following the expiration of ten (10) years from and after the date of execution hereof, at any time during the remainder of the term hereof have the sole and exclusive option to declare the entire unpaid balance due and payable upon giving to the undersigned sixty (60) days notice in writing of its intent to declare the same due and payable.

The undersigned further agrees to pay to Walker or its assigns at the sole and exclusive option of Walker or its assigns, budget payments on a monthly basis in addition to principal and interest as hereinabove set forth. Such budget payments shall be in an amount equal to one-twelfth (1/12) of the annual real property taxes and casualty insurance premiums on the real property and improvements described in the Deed of Trust securing this Note and with respect thereto, the undersigned further acknowledges and agrees that neither Walker nor its assigns is obligated to pay and the undersigned specifically waives any claim to the payment of interest, earnings or other sums or amounts by Walker or its assigns on such budget payments. Neither Walker nor its assigns shall pay interest or earnings on any other sums or amounts held for the benefit of or deposited by the undersigned in connection with this Note or the Deed of Trust securing the same.

In the event of the exercise of said option, Walker or its assigns shall give to the undersigned thirty (30) days notice in writing of its intent to require payment by the undersigned of said budget payments.

In the event any installment or payment (including an instal ment or payment with respect to which the late charge provided fo in this Paragraph has previously been imposed) provided to be mad hereunder, or under any instrument given to secure the payment of the obligation evidenced hereby, has not been paid in full on or before the fifteenth (15th) day of any month the same is due as provided herein, the holder hereof shall have the right to demand of and receive from the undersigned a late charge equal to four percent (4%) of the entirety of such installment or payment.

In the event: (a) any installment provided for hereunder i not paid in full within fifteen (15) days after its scheduled due date; or (b) the undersigned defaults in the performance of any covenant or promise contained herein or in any instrument given to secure the payment of the obligations evidenced hereby; or (c) a petition is filed seeking that any of the undersigned or any general partner in any of the undersigned be adjudged a bankrupt; or (d) any of the undersigned or any general partner in any of th undersigned makes a general assignment for the benefit of creditо or (e) any of the undersigned or any general partner in any of th undersigned suffers the appointment of a receiver; or (f) any of the undersigned or any general partner in any of the undersigned becomes insolvent; or (g) any of the undersigned or any general partner in any of the undersigned undergoes liquidation, termination, or dissolution, then, in any of such events and upon fifteen (15) days written notice given to the undersigned by Walker or its assigns which default or event shall not be cured by the undersigned within fifteen (15) days following such writte notice, the entire remaining unpaid balance of both principal and interest owing hereunder shall, at the option of the holder hereof and without notice or demand, become immediately due and payable. Thereafter, said unpaid balance, including interest, shall, until paid and both before and after judgment, earn intere at the rate of fifteen percent (15%) per annum. As used herein, written notice shall be effective as of the time the same is deposited in the United Sataes Mails addressed to the last known address of the undersigned or the time of the actual receipt thereof, if earlier. The acceptance of any installment or payment after the occurrence of a default or event giving rise to the right of acceleration provided for in this Paragraph shall not constitute a waiver of such right of acceleration with respec to such default or event or any subsequent default or event.

In the event any payment under this Note is not made, or any obligation provided to be satisfied or performed under any instru ment given to secure the obligation evidenced hereby is not satis fied or performed, at the time and in the manner required, the undersigned agrees to pay any and all costs and expenses (regardless of the particular nature thereof and whether or not incurred in conjunction with litigation, before or after judgment, or in connection with exercise of power of sale provided for in the Deed of Trust securing this Note) which may be incurred by the holder hereof in connection with the enforcement of any of its rights under this Note or under any such other instrument, includ court costs and reasonable Trustee's and Attorney's fees.

Notwithstanding any other provision contained in this Note or in any instrument given to secure the obligation evidenced her (i) the rates of interest, charges and penalties provided for herein and therein shall in no event exceed the rates, charges, and penalties which result in interest being charged at a rate equaling the maximum allowed by law; and (ii) if, for any reason

whatsoever, the holder hereof ever received as interest in connection with the transaction of which this Note is a part an amount which would result in interest being charged at a rate exceeding the maximum allowed by law, such amount or portion thereof as would otherwise be excessive interest shall automatically be applied toward reduction of the unpaid principal balance then outstanding hereunder and not toward payment of interest.

The makers, sureties, guarantors, and endorsers hereof severally waive presentment for payment, protest, demand, notice of protest, notice of dishonor, and notice of nonpayment, and expressly agree that this Note, or any payment hereunder, may be extended from time to time by the holder hereof without in any way affecting the liability of such parties. This Note shall be the joint and several obligation of all makers, sureties, guarantors and endorsers and shall be binding upon their respective heirs, personal representatives, successors and assigns.

In the event any of the undersigned is a partnership or corporation, each person executing this instrument on behalf of such entity individually and personally represents and warrants that this Note and each instrument signed in the name of such entity and delivered to secure the obligation evidenced hereby is in all respects binding upon such entity as an act and obligation of said partnership or corporation.

This Note and the Deed of Trust securing the same shall be fully and freely assignable in whole or in part by Walker or its assigns as they shall deem advisable without notice to the undersigned.

This Note is given in consideration of a loan made by Walker to the undersigned for business purposes and not personal, family, household, or agricultural purposes and is principally secured by a Deed of Trust covering real property situated in Summit County, State of Utah. This Note shall be governed by and construed in accordance with the laws of the State of Utah.

DATED this _____ day of _____, 1978.

ATTEST:

PARK CITY RACQUET CLUB, a Utah corporation

_____
Secretary

By _____
President

For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the undersigned jointly and severally guarantee payment of this Promissory Note (Secured by Deed of Trust) and further guarantee payment of the entire indebtedness evidenced thereby and the Deed of Trust securing the same.

_____
FREDERICK G. BECKER II, Individually

_____
MARGARET M. BECKER, Individually

_____
VICTOR R. AYERS, Individually

_____
MARION P. AYERS, Individually

015781

J. LYNN DOUGAN, Individually

DIANA LADY DOUGAN, Individually

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

On the ____ day of _____, 1978, personally appeared before me, _____ and _____ who being by me first duly sworn, did say that they the President and Secretary, respectively, of PARK CITY RACQUET CLUB, and the foregoing instrument was signed on behalf of said corporation by authority of a Resolution of its Board of Directo or its By-laws, and said _____ and _____ acknowledged to me that said corporation executed the same.

Notary Public
Residing at: _____

My Commission Expires:

_____

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

On the _____ day of _____, 1978, personally appeared before me FREDERICK G. BECKER, II, MARGARET M. BECKER, VICTOR R. AYERS, MARION P. AYERS, J. LYNN DOUGAN and DIANA LADY DOUGAN, the signers above named, who being by me first duly sworn acknowledged to me that they executed the within and foregoing instrument.

Notary Public
Residing at: _____

My Commission Expires:

_____

ADDENDUM C

PARK MEADOWS DEVELOPMENT AND RELATED ENTITIES:
WORKOUT ARRANGEMENT WITH FIUT AND FSB

1. At the contemplated closing, interest in the approximate sum of $600,000, will be brought current on all loans of both Banks to Park Meadows Development and related entities. The source of funds will be $200,000 from the Smiths and loans proceeds from FSB, if approved.

2. Mark Howell will seek FSB approval of a loan to PMD in the maximum sum of $1,000,000 to be utilized to pay the balance of accrued interest, general claimants ($164,000), and Jack Nicklaus ($13,900), and to provide working capital needs in the future. Such future draws will be permitted only after submission and approval of detailed budgets and/or invoices to both banks. PMD will provide notification of actual expenditures to both banks. Such loan shall be secured by a first priority lien (by reason of subordination) on all properties subject to the blanket mortgage mentioned in paragraph 4 hereafter (except for First Federal's trust deeds).

3. PMD will be allowed to pay the $300,000 debt to Enoch Smith Sons Company out of lot sale proceeds at the rate of 5 percent of such proceeds. This will require total sales of $6,000,000.

4. A blanket mortgage for the benefit of FSB and FIUT will be placed on all of Park Meadows properties (exclusive of Park Meadows Mountain), and the assets of Enoch and Dick Smith. This mortgage will not disturb the first trust deeds of First Federal or FSB as to Gleneagles and Lot 1765, but will cover any equity in those properties. Said mortgage will exclude the following assets of Enoch and Margaret Smith: Their home, two cars, Country Club membership, $250,000 in cash, $184,000 worth of securities to be identified, two stud horses, life insurance, and Enoch Smith Sons Company and its assets. Also excluded are the real property where Enoch Smith Sons Company is located and all other stock in that company. Enoch Smith Sons Company will remain liable to FIUT on the $500,000 loan. The blanket mortgage will secure all debt of PMD to FSB and FIUT, and also the debts to FIUT of Smith Park Acres Ranch, Enoch Smith Company, Weaver Quality Welding, and the "Ayers" loan. The "Ayers" loan will cease to be an obligation of Enoch Smith Sons Co.

5. Enoch and Margaret Smith will be released from whatever personal liability may exist on the FSB debt, FIUT's PMD, Enoch Smith Co. and Smith Park Acres loans and the "Ayers" loan. Enoch Smith will retain whatever liability he now has

on the $500,000 Enoch Smith Sons Company loan. Dick Smith will not have personal liability on the "Ayers" debt.

6. The Enoch Smith Sons Company $500,000 loan will be repayable by quarterly interest only payments for one year with a due date in one year at a rate of FIUT's prime rate plus ½% and prime rate plus 2½% after default. It will be renewable on the same terms for an additional year if no default exists.

7. Smiths to provide Banks with budgets acceptable to banks and schedule of price listings for lots, including variables for bulk sales, for Banks' approval. If parties can't agree with respect to prices, the parties agree to select a mutually acceptable third party to set prices, considering current market and need to sell within a relatively short period of time.

8. Sales proceeds to be allocated as follows after payment of commissions: Allowed first trust deeds release prices where applicable (First Federal and First Security's Gleneagles, and lot 1765); some allowance for working capital needs; balance to FIUT and FSB for their agreed pro rata distribution.

9. Pro rata distribution with FIUT and FSB: Straight pro rata based on relative total debt for accrued interest (exclusive of "Ayers" debt): Principal reductions to pay off FSB first, including the loan under paragraph 2 above, then remainder to FIUT. Essentially, FIUT subordinates to FSB. The order of payment of FIUT's loans secured by the blanket mortgage will be as follows: $100,000 loan to Enoch Smith Co.; $250,000 loan to Smith Park Acres Ranch; $150,000 loan to Weavers Quality Welding; loans to Park Meadows Investments; "Ayers" loan. In the event that the Kentucky ranch is sold, the proceeds will be applied to the extent necessary to pay the Smith Park Acres loan, with any excess to be considered proceeds of the blanket mortgage. If assets of Weavers Quality Welding are sold, the net proceeds will be applied to that company's loan.

10. Require retention of professional sales or project manager either initially or if performance falters.

11. Banks to be informed of any and all offers, firm or tentative, to purchase lots, parcels, the whole project, etc.

12. Banks will use best efforts to satisfy obligations out of collateral other than Park City ranch.

13. Dismissal of FSB's pending foreclosure action and press release of same.

14. Enoch and Dick Smith will subordinate their right as partners of Park Meadows Investment to receive proceeds from Park Meadows Mountain to FIUT's "Ayers" loan.

15. All of the loans to be secured by the blanket mortgage and the new loan which is provided in paragragh 2 above shall be 18 month term loans, with interest payable on a quarterly basis commencing September 1, 1985, interest accruing at the rate of ½% above the prime rate of the respective banks. Interest on "Ayers" loan to be deferred to maturity date. Loan documentation shall include the agreement and obligation of Park Meadows Development and the Borrowers to meet agreed upon dollar volumes of property sales from the Park Meadows project by agreed upon guideline dates. A failure to meet those goals will constitute a default under the terms of the loan documentation, provided however, that a reasonable period (to be hereafter determined in the reasonable discretion of the Banks) will be allowed for cure and reinstatement. Cure and reinstatement will be conditioned upon evidence, satisfactory to FSB and FIUT that the sales required for satisfaction of the goals are immediately forthcoming or that they, in fact, have occurred; and, further, upon reasonable satisfaction of FSB and FIUT that the reasons for the failure to meet the goals are not to continue or result in any substantial likelihood of further defaults and failures. FSB and FIUT will agree that an additional 18 month term will be granted so long as the aforesaid sales goals are being met and no other defaults exist under the loan documents. In this connection, it is agreed that, net of amounts due to First Federal on properties on which it maintains 1st priority encumbrances, all sale proceeds shall be applied as set forth in the paragraphs above.

16. If default occurs and is not cured as provided in paragraph 15 above, interest will accrue at the rate of 2½% above the respective prime rates of the respective banks.

Agreed to this 19th day of June, 1985.

FIRST SECURITY BANK OF UTAH, N.A.

By: _____

Richard Smith - for
Park Meadows Investment
fka Park Meadows Development
Enoch Smith Sons Company
Enoch Smith Co.
Smith Park Acres Ranch
Weavers Quality Welding,
Individually

FIRST INTERSTATE BANK OF UTAH, N.A.

By: _____ EX. V.P.

Enoch Smith, Jr.

0354M

ADDENDUM D

AMENDMENT AND EXTENSION AGREEMENT

THIS AGREEMENT is entered into, effective as of June 28, 1985, by and among PARK MEADOWS INVESTMENT CO. (formerly known as Park Meadows Development Co.), a Utah Partnership; ENOCH RICHARD SMITH; ENOCH SMITH, JR.; MARGARET SMITH; ENOCH SMITH CO., a Utah Corporation; ENOCH SMITH SONS CO., a Utah Corporation; WEAVER'S QUALITY WELDING, a Utah Corporation (all hereinafter collectively referred to as "Borrowers") and FIRST INTERSTATE BANK OF UTAH, N.A. (hereinafter referred to as "First Interstate").

RECITALS

1. First Interstate has previously extended the following loans to one or more of Borrowers, some of which are personally guaranteed by one or more of Borrowers:

a. A loan to Park Meadows Investment Co. with a principal balance of $3,125,000.00 evidenced by a Promissory Note dated August 29, 1983, secured by various Trust Deeds.

b. A loan to Park Meadows Investment Co. with a principal balance of $1,286,000.00 evidenced by a Promissory Note dated August 29, 1983, secured by various Trust Deeds.

c. An unsecured loan to Park Meadows Investment Co. in the principal sum of $615,351.01 evidenced by a Promissory Note dated December 2, 1984.

d. An unsecured loan to Park Meadows Investment Co. in the principal sum of $149,973.99 evidenced by a Promissory Note dated December 31, 1984.

e. An unsecured loan to Park Meadows Investment Co. in the principal sum of $149,074.59 evidenced by a Promissory Note dated February 28, 1985.

f. A loan to Enoch Smith Sons Co. with a principal balance of $3,961,875.66 evidenced by a Promissory Note dated August 29, 1983, secured by an assignment of 23.5 percent interest in Park Meadows Investment Co. (the "Partnership Note").

g. An unsecured loan to Enoch Smith Company with a principal balance of $100,000 evidenced by a Promissory Note dated February 28, 1985.

h. An unsecured loan to Enoch Smith, Jr., d/b/a Smith Park Acres Ranch with a principal balance

of $250,000 evidenced by a Promissory Note dated February 28, 1985.

i. An unsecured loan to Weaver Quality Welding with a principal balance of $150,000 evidenced by a Promissory Note dated February 28, 1985.

(Referred to collectively herein as the "Notes").

2. In connection with negotiations surrounding the aforesaid loans and the obligations of Borrowers on other loans, some of which are in default, certain accommodations have been agreed to by First Interstate in exchange for certain additional consideration (including the granting of additional collateral and certain accommodations by and arrangements with First Security Bank of Utah, N.A., hereinafter referred to as "First Security").

3. Pursuant to the terms of the negotiated agreements among Borrowers, First Security and First Interstate, extension of the maturity of the above described loans and amendment to the payment and interest terms are to be accomplished.

AGREEMENT

NOW THEREFORE, in consideration of the foregoing, and as required under the terms of other agreements executed on the effective date of this Agreement, and in consideration of the mutual covenants, promises and agreements hereinafter set forth, it is agreed by and among the parties as follows:

1. Extension of maturity date. The maturity date of the Notes is hereby amended and extended to be December 31, 1986, at which time all outstanding and unpaid principal, along with all accrued and unpaid interest and other charges, fees and obligations payable in connection with the same shall be due and payable, in full.

2. Revision of interest rate. The interest rates applicable to the notes are hereby amended to provide that interest, from and after June 30, 1985 shall accrue at the rate of one-half percent (.5%) above the Prime Rate of First Interstate as announced and as changed from time to time. First Interstate may make loans at, above, or below its Prime Rate. After the date of any default or event of default under the Notes or this Agreement, the rate of interest rate per annum shall be two and one-half percent (2.5%) above First Interstate's Prime Rate until such default shall be cured or payment in full made.

3. Revision of payment terms. Interest payments on the Notes except the Partnership Note shall be payable on

the first day of each calendar quarter commencing on October 1, 1985, until paid in full. Mandatory prepayments of the principal amount outstanding under the Notes shall be made in accordance with the terms of that certain "Park Meadows Development and Related Entities: Workout Arrangement with FIUT and FSB", dated June 19, 1985 (the "Arrangement Agreement"), as sales of the properties securing the Notes are made and as provided in paragraph 5 below. Accrued interest on the Partnership Note shall be payable in full at maturity.

4. Cross default provisions. Any default under the Notes, the Trust Deeds or Supplemental Security Agreement securing the Notes, or this Agreement shall constitute default or an event of default under the others.

5. Principal payments. Attached hereto as Exhibit "A" and incorporated herein, is a Project Marketing Schedule, which sets forth a schedule of gross sales volume to be accomplished by Borrowers of property which is part of Park Meadows and which serves as collateral for the Notes (such property hereinafter referred to as the "Project"). The Project marketing schedule sets out specific periods of time within which certain gross dollar volumes of sales of the Project are required. Each such period is referred to hereinafter as a "Marketing Period". Subject to the allowances provided hereinafter, for payment of budgeted operating expenses, the ordinary costs of sale, and satisfaction and payment of release prices on First Federal Savings and Loan priority Trust Deeds release prices and certain priority Trust Deeds of First Security referred to in the Arrangement Agreement, the following is required:

a. All proceeds of any of the collateral security for the Notes and for the obligations of Borrower to First Security referred to in the Arrangement Agreement shall be paid over to First Security and disbursed by First Security in accordance with the provisions of that certain Intercreditor Agreement dated June 28, 1985 between First Security and First Interstate (the "Intercreditor Agreement"). At such time as the obligations to First Security have been satisfied and paid in full, said sales proceeds shall be paid over to First Interstate.

b. Borrowers covenant and agree to meet the schedule sales volumes in the Project for each Marketing Period which is set out in the Project Marketing Schedule, the proceeds of which will be applied to reduction of the First Security Loans and the Notes, in accordance with the Intercreditor Agreement and the Arrangement Agreement; and subject to the cure and grace provisions hereinafter set forth, in all events Borrowers shall make principal reduction

payments to First Security for the benefit of First Security and First Interstate equivalent to those which would have been provided by reason of sales in the volumes required under the Project Marketing Schedule for each Marketing Period.

Notwithstanding the foregoing, if, on the last day of any Marketing Period the specified volume of sales required has not been accomplished, the default occasioned by the failure to meet such volume and/or provide the related principal reduction payment shall not result in immediate exercise of remedies by First Interstate hereunder so long as by the said ending date of the Marketing Period, 75 percent of the sales volume required shall have been accomplished and there is a reasonable likelihood, in the judgment of First Interstate and First Security, so long as Borrowers are indebted to First Security (First Security and First Interstate may require evidence of bona fide offers to purchase scheduled to close during such period), that the remaining 25 percent of such sales may be accomplished within 45 days after the end of the Marketing Period. First Interstate agrees to forebear with respect to the exercise of its default remedies for a period of 45 days in such eventuality. If during the subsequent 45 day period the remaining 25 percent of sales volume and/or payment of the required principal reduction shall have been accomplished and there is nothing which, in the reasonable judgment of First Interstate appears to be a continuing problem or defect which would likely result in a succeeding failure to meet the Project Marketing Schedule's sales volume required for the current or any subsequent Marketing Period, the original default shall be cured and this Agreement shall proceed as if no such default shall have ever occurred.

6. Project budget. Borrowers agree to provide for approval of First Interstate and First Security a projected budget for the operation, maintenance, and marketing of the Project (the "OMM Budget"). The OMM Budget shall be adjusted and amended monthly by Borrowers to reflect current facts and circumstances. So long as the OMM Budget shall have been and continues to be approved by First Interstate and First Security (including most recent and current amendments or modifications thereto), then First Interstate agrees that certain other proceeds of each sale of any of the project or of any part of parcel thereof, shall be paid to Borrowers for purposes of meeting OMM Budget allowed expenditures, the amount of such allowance (the "Budget Allowance") being calculated as follows:

The budget allowance to be paid to Borrowers shall be the amount obtained by multiplying the amount of operating, maintenance, and marketing expenses for the applicable Marketing Period (as set out in the current approved OMM Budget) by a percentage which shall be equal to the percentage obtained by dividing the gross

sale price of the subject sale by the gross sales volume required under the Project Sales Scheduled for the Marketing Period in which the sale occurs.

Notwithstanding the foregoing, if the subject sale shall be one which is over the required gross sales volume for the applicable Marketing Period, then the calculation shall be made as if in following Marketing Period, or, if applicable, subsequent Marketing Periods. Further, it is understood and agreed that the provisions of this paragraph allowing for disbursements from sales proceeds for expenditures in or part of the OMM Budget shall be inapplicable upon occurrence of an event of default under this Agreement or otherwise, unless a cure period as provided hereunder or in the Notes is then in effect.

In all events, Borrowers shall, unless consented in writing by First Interstate and First Security, make only such expenditures as are contemplated by the approved OMM Budget and shall incur only such liabilities as shall be also contemplated by the approved OMM Budget. Further, if expenses actually incurred during the Marketing Period are less than those appearing in the OMM Budget, subsequent adjusting offsets against disbursements from sales proceeds shall occur (if Borrower shall actually have received sales related disbursements in the budget for such Marketing Period).

7. Marketing efforts. As Borrowers understand that the repayment of the amounts owed to First Interstate hereunder and those owed to First Security are dependant upon effective and immediate marketing and sales of the Project, Borrowers agree to vigorously engage in marketing of the Project. If First Security and First Interstate shall require hereinafter in writing, Borrowers will engage the services of professional managers or marketers or consultants for purposes of expediting and completing an orderly and complete sale of the Project (whether by parcel or as a whole). In that connection, Borrowers agree further as follows:

a. Borrowers shall submit to First Interstate and First Security copies of all offers, inquiries, earnest monies, and other written requests relating to the purchase of the Project or any portion thereof.

b. Borrowers will immediately submit a proposed list of sales prices for the Project which shall be approved and agreed to by First Interstate and First Security provided that if no such approval can be obtained, the procedures provided in paragraph 7 of the Arrangement Agreement shall be immediately implemented. Borrowers will accept any offer to purchase which

reasonably approximates the prices set in the price list.

c. Borrowers will keep accurate records of all expenses and income with respect to the Project and shall also maintain books, records, and financial statements appropriate for the control of the Project and its operation, maintenance and marketing in accordance with the OMM Budget, as approved.

d. Borrowers will submit to First Interstate and First Security such records, reports, and copies of such documents as the said lender shall reasonably request from time to time, as the same relate to the physical status of the Project, its marketing, and all sales or other dispositions.

e. Unless approved in writing by First Interstate and First Security, no sale of any part or parcel of the Project shall be for other than cash and all parties agree that "sale" as used herein shall only be a sale upon actual closing, transfer of title, and payment of purchase price by the buyer or on buyer's behalf.

f. Borrowers shall allow representatives of First Interstate and First Security access to the Project at any time and shall also allow them opportunity at any reasonable hour to inspect the books and records of the Borrowers and shall provide for access by said lenders to the sales records and other marketing records which may be kept by third parties as they respect the Project.

g. Borrowers shall make no listing arrangement, contract for consulting for marketing or disposition of the Project or any part of parcel thereof without the prior written approval of First Interstate and First Security, which approval shall not be unreasonably withheld.

h. Borrowers do hereby warrant and represent to First Interstate that they have the title, right and interest necessary to grant the security interest, assignments, and liens in the items of collateral securing the Notes.

i. Borrowers are in compliance with all laws, regulations, and governmental authority with respect to the Project and any of the property in which security interest or liens are granted to secure the Notes and will continue such compliance and observance hereafter.

j. Borrowers shall take all reasonable actions necessary to preserve the assets and property in which First Interstate has a security interest to secure the Notes, including paying all necessary taxes or other impositions or assessments, physically maintaining the same, providing such care and feeding as may be required, and maintaining such insurance against hazards and other risks as First Interstate may require in connection with the same. Such insurance as is maintained shall be in form satisfactory to First Interstate and shall, as requested and available, contain loss payable clauses in favor of First Interstate as secured party or mortgagee.

k. Except as provided for and contemplated by this Agreement, the Arrangement Agreement and documents related thereto, Borrowers agree not to further encumber or pledge any of their respective assets to any other person or persons.

l. Borrower shall take no actions and enter into no contracts, leases or other agreements without the prior written consent of First Interstate which will materially and adversely effect the ability of Borrowers to market the Project in compliance with the requirements of the Project Marketing Schedule.

8. Other modifications--continuation of other terms. First Interstate hereby agrees that recourse against Enoch Smith, Jr. and Margaret Smith shall be and is hereby limited to items of real and personal property which are or have been provided as collateral security for the obligations under the Notes. It is further agreed that Enoch Smith Sons Co. is relieved from liability under the Partnership Note and First Interstate's sole recourse under said partnership note shall be to the collateral pledged as security therefor.

Notwithstanding the foregoing, the aforesaid release and nonrecourse covenant is based upon representations and warranties of Enoch Smith, Jr. and Margaret Smith relative to their overall assets and their rights in assets given as collateral security for the Notes. Accordingly, in the event that there shall have been any material and intentional misrepresentation (including the failure to disclose material facts) the aforesaid nonrecourse covenant shall be void and of no force or effect. Further, the releases made hereunder shall in no way result in (unless otherwise provided in writing signed by First Interstate) a release or waiver of claim for any other persons, entities, or parties obligated on the loans mentioned hereinabove.

9. Subordination. Enoch Smith, Jr. and Enoch Richard Smith further agree and hereby do subordinate their rights as partners of Park Meadows Investment Co. to receive

proceeds from Park Meadows Mountain, a Utah general partnership, to First Interstate's rights to payments under the Notes, and agree that any payments or proceeds so received will be promptly paid over to First Interstate until such time as the Notes are paid in full.

10. Other terms. In all other respects, the terms and conditions of the Notes shall continue to be in full force and effect, including, but not limited to, collateral pledged and guarantees.

11. Subordination. Bank hereby acknowledges and agrees that Borrowers are contemporaneously herewith executing in favor of Bank trust deeds on real property known as Park Meadows, X-S Storage, St. George Condos, Smith Park Acres Ranch and the Kentucky Ranch (by mortgage instrument) and that said trust deeds and mortgage shall be subordinate and inferior to a similar pledge to First Security, all as contemplated by the Arrangement Agreement.

IN WITNESS WHEREOF, the parties hereto do set their hands and cause the execution of this Agreement, effective on the "effective date" first set forth hereinabove.

PARK MEADOWS INVESTMENT CO.
(a.k.a. Park Meadows
Development Co.)

By _____
ENOCH RICHARD SMITH,
General Partner
Date: 7-19, 1985

ENOCH SMITH SONS CO.

By _____

Its Vice Pres
Date: 7-19, 1985

ENOCH SMITH CO.

By _____

Its Vice Pres
Date: 7-19, 1985

WEAVER QUALITY WELDING

By _____

Its Vice Pres
Date: 7-19, 1985

_____
ENOCH RICHARD SMITH,
Individually
Date: 7-19, 1985

_____
ENOCH SMITH, JR., Individually
Date: 7-19, 1985

_____
MARGARET SMITH, Individually
Date: 7-19, 1985

FIRST INTERSTATE BANK OF
UTAH, N.A.

By: _____

Its: SVP
Date: 7-23, 1985

Ll:aa

EXHIBIT A to Amendment and Extension Agreement

The attached Marketing Schedule/Budget shall be reviewed and analyzed by Borrowers, First Security and First Interstate. The parties shall cooperate in establishing the quarterly goals of marketing and quarterly budget requirements, based upon the annual totals in the attached schedule. The parties shall also consider the effect of, and an appropriate adjustment regarding the period from the date of this Schedule, July 23, 1985, to the end of the calendar quarter, September 30, 1985.

[illegible]

[illegible]

[illegible]	[illegible]
Manager	$ [illegible]
[illegible]	$ [illegible]
Marketing	$ [illegible]
[illegible]	
[illegible]	$ 7,500.00
Rabbi	$ 3,500.00
[illegible]	$ 3,500.00
Country Club	$10,000.00
[illegible]	
[illegible]	$ [illegible]
[illegible]	$ [illegible]
[illegible]	
Legal & Accounting	$10,000.00
Total Per Year	$53,770.00

Assumptions: 1. Current Inventory ($6,307,108) discounted 30% except Gleaneagles. Gleneagles is discounted 44%. Total of $5,568,976 / 3years = $ 1,856,325.
2. Price per unit to esclate $ 5,000 per year
3. Calendar year to begin when settlement agreement is reached.

Park Meadows (Meadows Only 979 units)
Potential Pro Forma Cash Flow 3 years
1985 to 1988

	1985-86	1986-87	1987-88
Income			
Parcel Units Sold (1)	326	326	327
Price/Parcel Units(2)	25000	30000	35000
Current Inventory	1856325	1856325	1856325
Total Income	10006325	11636325	13301325
Operating Expenses			
Gen & Admin (4)	315000	337058	360644
Park Mead CC (5)	120000	100000	80000
Advertising (6)	200126	232726	266026
Sales Comm. (7)	600379	698178	798078
Miscellaneous(8)	200126	232726	266026
Property Taxes(9)	200000	133333	66667
Total Expenses	1635631	1734021	1637441
Oper. Cash Flow	8370694	9902304	11463884
Capital Improvements			
Struc. Dev. (10)	1733600	1392000	
Club House (11)			
Tennis Club (12)			
Total	1733600	1392000	
Cash Flow Before Interest & Debt Reduction (13)	6637094	8510304	11463884
Other Debt	666666	666666	666666
Interest Payment(14)	1780000	1360957	712689
Principal Reduction	4190428	6482681	7126891
Loan Balance($17,800,000) @ 10% Interest	13609572	7126891	
Net Profit Before Taxes & Depr.			2957638

CERTIFICATE OF SERVICE

I hereby certify that I caused to be hand delivered, a true and correct copy of the foregoing Brief of Appellant First Interstate Bank of Utah this 22nd day of November, 1989, to the following:

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Lisia Hewitson

KRHP:EN3